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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1989

J. L. LEEF, M. D.
and
ASSOCIATED RADIOLOGISTS, INC.,

Petitioners,

v.

IRIS MARTIN, ADMINISTRATRIX
OF THE ESTATE OF MILAS MARTIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

BERT M. GRIMM, JR.,
Counsel of Record
Steven K. Nord
WOOD, GRIMM & DELP
Penthouse Suites
The Frederick Building
4th Avenue & 10th Street
Huntington, WV 25701

(304) 529-0333

QUESTION PRESENTED

Whether a state's highest court violates the due process clause of the Fourteenth Amendment to the Constitution of the United States when it acts beyond the scope of its appellate jurisdiction in setting aside a jury verdict in a civil trial and ordering a new trial to the detriment of a defendant.

PARTIES TO THE PROCEEDING BELOW

Original parties to the proceeding below included the plaintiff as named in the Writ of Certiorari, respondent herein, and defendants, Charleston Area Medical Center, Inc., Dr. J. L. Leef, M.D., Associated Radiologists, Inc., Edward G. Lewis, M.D., and Edward G. Lewis, M.D., Inc.

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IN THE
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October Term, 1989

J. L. LEEF, M. D.
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ASSOCIATED RADIOLOGISTS, INC.,

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v.

IRIS MARTIN, ADMINISTRATRIX
OF THE ESTATE OF MILAS MARTIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The petitioners, J.L. Leef, M.D., and Associated Radiologists, Inc., respectfully pray that a Writ of Certiorari issue to review the final order and decision of the Supreme Court of Appeals of West Virginia granting an appeal, entered March 7, 1988.

OPINION BELOW

The Supreme Court of Appeals issued its opinion in Iris Martin, Admx. v. Charleston Area Medical Ctr., et al., on March 9, 1989, via slip opinion in Case No. 18342, and is published at ___ W.Va. ___, 382 S.E.2d 502 (1989).

The March 7, 1988, Order Granting Petition for Appeal, the March 31, 1988, Order Denying Motion to Dismiss Appeal as Being Improvidently Awarded and the July 20, 1989, Order Denying Rehearing are reprinted in the Appendix of this petition.

JURISDICTION

The order and decision of the Supreme Court of Appeals of West Virginia granting the petition for appeal was entered March 7, 1988. The petitioners timely filed a Motion to Dismiss the Appeal as Improvidently Awarded on March 24, 1988. Said motion was denied by the court March 31, 1988. Following the appeal and decision reversing the lower court judgment and ordering a new trial, petitioners timely filed a petition for rehearing. The court denied the petition for rehearing on July 20, 1989.

The court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is Amendment XIV of the Constitution of the United States. The statutory provisions involved are West Virginia Code Sections 58-5-4 and 58-5-16. Both the constitutional and statutory provisions are contained in the Appendix.

STATEMENT OF THE CASE

Proceedings Below

Dr. J. L. Leef, M.D., and Associated Radiologists, Inc., defendant-appellees in the opinion below and petitioners herein, were named as defendants in a wrongful death action brought by Iris Martin, the respondent herein.

The case was tried before a jury in August of 1985. On August 28, 1985, the jury returned a verdict in favor of Iris Martin in the amount of $250,000.00. The jury assigned fault for the death of Mr. Martin as follows:

Milas Martin	40%
Dr. Leef	15%
Other defendants	45%
	100%

Plaintiff then filed post trial motions seeking, inter alia, a new trial on all issues. The trial court denied

plaintiff's motion on June 24, 1986.

Contemplating appeal to the West Virginia Supreme Court of Appeals, plaintiff requested a four-month extension of time in which to file her appeal. The Supreme Court of Appeals granted plaintiff's request for a four-month extension of time to appeal by Order of February 20, 1987.

Plaintiff filed her Petition for Appeal and Designation of the Record with the Clerk of the Circuit Court of Kanawha County, West Virginia, on June 24, 1987. The Petition for Appeal and Record of the trial court were received by the Clerk of the West Virginia Supreme Court of Appeals on July 30, 1987, six days after the statutory deadline.

Defendants, J. L. Leef, M.D., and Associated Radiologists, Inc., filed with

the Supreme Court of Appeals a Memorandum of Law opposing plaintiff's Petition for Appeal on August 5, 1987, based upon the untimeliness of plaintiff's appeal. Plaintiff filed a reply to defendant's Memorandum on August 24, 1987. The Petition for Appeal was granted by the Supreme Court of Appeals by Order dated March 7, 1988.

Defendants then filed a Motion to Dismiss Appeal as Improvidently Awarded, which was denied in a summary opinion rendered March 31, 1988. Following the submission of briefs and presentation of oral argument, the Supreme Court of Appeals reversed the Circuit Court and remanded the case for a new trial on all issues by decision dated March 9, 1989. A Petition for Rehearing was filed by defendants, J. L. Leef, M.D., and

Associated Radiologists, Inc., on April 4, 1989, and was denied in a summary opinion rendered July 20, 1989. Having exhausted all remedies available under state law, counsel for J. L. Leef, M.D., and Associated Radiologists, Inc., filed the foregoing Petition for a Writ of Certiorari on October 18, 1989.

How Federal Question is Presented

The constitutional issue raised herein did not become ripe for review until such time as the Supreme Court of Appeals of West Virginia granted respondent's petition for appeal and denied petitioners' Motion to Dismiss Appeal as Improvidently Awarded and Petition for Rehearing. In denying the Motion to Dismiss Appeal, Petition for Rehearing, and awarding the respondent a new trial, the Supreme Court of Appeals violated the West Virginia Code, the Rules of Appellate Procedure and the West Virginia Constitution. Only when the Supreme Court of Appeals chose to ignore the laws of the State of West Virginia and thereby act without jurisdiction, did it deprive the petitioners of their

federal constitutional due process rights.

Statutory Scheme

Appellate review of Circuit (trial) Court decisions is governed by the West Virginia Code, Chapter 58, Article 5, Sections 1 through 31. Appellate review by the highest court, the Supreme Court of Appeals, is entirely discretionary. No intermediate appellate court exists in West Virginia.

West Virginia Code Section 58-5-4 and Rule 3(a) of the Rules of Appellate Procedure, West Virginia Supreme Court of Appeals, govern the time within which a petition for appeal may be presented. Both the statute and rule state that no

petition for appeal may be presented to the court if more than twelve months have passed since the judgment or decree complained of has been rendered.

Section 58-5-16 mandates the filing of the Circuit Court record of the cause being appealed. The record need not accompany the petition for appeal, but must be filed with the Clerk of the Appellate Court within that time permitted for the filing of a petition for appeal. Rule 4A of the Rules of Appellate Procedure permits the filing of a petition without the transcript of testimony, but does not extend the time allowed for the filing of the appeal petition.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment to the Constitution of the United States guarantees that no person shall be deprived of "life, liberty, or property, without due process of law." The West Virginia Supreme Court of Appeals' failure to follow its own rules of appellate procedure and the requirements of the state statute conferring jurisdiction upon that court violated the petitioners' right to due process of law.

The property right petitioners were deprived of in the present case is one of a full and final judgment. "A statute which authorizes an appeal from a decree, perfected under prior laws, and on which the right to appeal under such laws has expired, is a deprivation of property,

within the meaning of the prohibition." 16A C.J.S Constitutional Law §626 (1956). In the instant case, no statute authorized an appeal. Rather, the West Virginia Supreme Court of Appeals, acting without statutory authority and in contravention of its own rules, took jurisdiction and granted a petition for appeal of a case in which it had lost jurisdiction by force of state statute. The court deprived petitioners of a property right that vested immediately after the statutory time period for appeal had expired. As stated by the New York Court of Appeals,

> An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, or authorizes a further appeal after the only appeal authorized by law had been brought and finally decided, although it might result in the reversal of the judgment, and

> be in the form of a judicial proceeding, would not be what is known as "due process of law," which is not satisfied by a judgment based upon an unconstitutional statute.

Germania Savings Bank v. Village of Suspension Bridge, 159 N.Y. 362, ___, 54 N.E. 33, 35 (N.Y. Ct. App. 1899).

In determining when the right attached, the court concluded,

> If, however, according to the law existing when the statute extending the time to appeal, or granting a new right of appeal, was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment conferred a vested right, and was property, of which the owner could not be deprived by an act of the legislature or otherwise then through due process of law.

Germania Savings Bank, 54 N.E. at 34.

Although this decision interprets the meaning of "due process" under the New York State Constitution, these

principles apply under the federal Constitution as well. In Scott v. McNeal, 154 U.S. 34 (1894), this court held that "[N]o judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." Id. at 45. In Scott, letters of administration were issued by a state probate court authorizing the administrator to sell real estate left by Scott, who was thought deceased. Subsequent to the sale of his land, Scott, who was not in fact dead, brought an ejectment action against McNeal, the purchaser, to recover possession of his land. This court ultimately held that the probate court had acted without jurisdiction, as jurisdiction of a probate court "does not exist or take effect before death." Id.

at 48.

Echoing the words of Justice Field in Pennoyer v. Neff, 95 U.S. 715 (1877), Justice Gray in writing for a unanimous court, opined, "[T]he words 'due process of law' when applied to judicial proceedings . . . mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution - that is, by the law of its creation - to pass upon the subject matter of the suit . . . ." Scott v. McNeal, 154, U.S. 34, 47 (1894).

The Scott decision was applied to a criminal case, Ex Parte Harlan, 180 F. 119 (N.D. Fla. 1909).

> The next ground urged for discharge is that the petitioners were indicted, convicted and sentenced by a court which was sitting at a time not authorized by law. If this be true, the proceeding from beginning to end would be coram non judice and void, and the affirmance of the conviction, by an appellate court, in which the trial is on the record and not de novo, would not cure the infirmity of a want of jurisdiction in the court which pronounced the sentence.

Ex Parte Harlan, 180 F. 119, 131, citing Scott v. McNeal, 154 U.S. 34 (1894).

The import of these decisions is clear. The very least that due process should ensure is that the courts that are established to adjudicate various legal rights do so according to law. Petitioners do not seek to reverse the court's substantive decision by procedural posturing. However, the statutes and rules that govern appellate

review by the Supreme Court of Appeals are justifiably relied upon by parties conducting their legal affairs within the state judicial system. The unsupported and summary violation of the rules by the Supreme Court of Appeals should not be tolerated any more than if they were violated by a member of the bar. More importantly, those violations should not work to the disadvantage of those who are not only required to abide by those rules, but in fact do so.

It is a fundamental principle of constitutional law that rules governing appeals must operate uniformly. 16A Am. Jur. 2d Constitutional Law §859 (1979). Without uniformity of application the decision-maker, in this case the Supreme Court of Appeals of West Virginia, may behave in an arbitrary, capricious and

inconsistent manner in allowing or denying untimely petitions for appeal.

The Supreme Court of Appeals has held that the West Virginia Code provisions dealing with the time for seeking appellate review are jurisdictional and mandatory, State ex rel. Johnson v. McKenzie, 159 W.Va. 795, 226 S.E.2d 721 (1976), have been applied literally and strictly, and are clear, unambiguous and mandatory. State v. Legg, 151 W.Va. 401, 151 S.E.2d 215 (1966). The failure to file timely is a jurisdictional infirmity. Davis v. Boles, 247 F.Supp. 751 (N.D. W.Va. 1965), West Virginia Department of Energy v. Hobet Mining and Construction Company, 358 S.E.2d 823 (1987). Furthermore, the Supreme Court of Appeals has held as recently as 1974 that an appeal granted

upon a petition not filed within the statutory appeal period will be dismissed as having been improvidently awarded. Dixon v. American Industrial Leasing Company, 157 W.Va. 735, 205 S.E.2d 4 (1974). A similar decision was reached in Asbury v. Mohn, 162 W.Va. 662, 256 S.E.2d 547 (1979), in which the court held that the appellate court does not acquire jurisdiction and cannot entertain an appeal unless the appeal petition is filed within the statutory time frame of West Virginia Code Section 58-5-4.

In its Petition for Rehearing and Motion to Dismiss Appeal as Improvidently Awarded, petitioners raised all of the issues relating to lack of jurisdiction and the Supreme Court of Appeals' apparent lack of respect for its own rules and the law of the state governing

petitions for appeal. In dispensing with petitioners' arguments, the court summarily denied the Petition for Rehearing and gave no substantive indication of its rationale for acting contrary to the law it, and the State Legislature, had created. As such, petitioners have no choice but to seek redress in this court.

CONCLUSION

The Supreme Court of Appeals of West Virginia acted without jurisdiction and in violation of state law, court rules and established precedent by granting the respondent's untimely petition for appeal. This action by the court was arbitrary and to the detriment of petitioners' due process rights.

Aside from the injustice suffered by the petitioners as the result of the deprivation of their due process rights, the question presented herein, if answered by this Court, may have broader significance to other parties in similar circumstances, as well as providing needed guidance to the appellate tribunals of the several states.

Respectfully submitted,

BERT M. GRIMM, JR.
STEVEN K. NORD
WOOD, GRIMM & DELP
Penthouse Suites
The Frederick Building
4th Avenue & 10th Street
Huntington, WV 25701

COUNSEL FOR PETITIONERS

October 18, 1989

APPENDIX

(Order Granting Petition for Appeal)

STATE OF WEST VIRGINIA,

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 7th day of March, 1988, the following order was made and entered.

Iris Martin, Administratrix of the Estate of Milas Martin, Deceased, Plaintiff Below, Appellant

vs.) No. 18342

Charleston Area Medical Center, Inc., J. L. Leef, M.D., Associated Radiologists, Inc., Edward G. Lewis, M.D., and Edward G. Lewis, M.D., Inc., Defendants Below, Appellees

On a former day, to-wit, July 30, 1987, came the petitioner, Iris Martin, Administratrix of the Estate of Milas Martin, Deceased, by Zagula, Hill & Dittmar and Barry M. Hill, her attorneys,

and presented to the Court her petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 24th day of June, 1986, with the record therein accompanying the petition; and thereafter, on August 5, 1987, came the appellees, J. L. Leef, M.D., and Associated Radiologists, Inc, by Wood, Grimm & Delp, Dee-Ann Burdette, and John F. Wood, Jr., their attorneys, and presented to the Court their memorandum of law in opposition to the aforesaid petition for appeal; and thereafter, on August 24, 1987, again came petitioner and presented to the Court her reply to the aforesaid respondents' memorandum in opposition, all of which being seen and inspected by the Court the appeal prayed for is granted, but it is not to take effect

until the petitioner or some person for her shall have given before the Clerk of the Circuit Court of Kanawha County bond with good personal security in the penalty of Fifty Dollars, conditioned according to law.

A True Copy

Attest: /s/Ancil G. Ramey
Clerk, Supreme Court
of Appeals

APPEAL - ORIGINAL

The State Of West Virginia

TO THE SHERIFF OF Kanawha COUNTY, GREETING:

Whereas, upon the petition of Iris Martin, Administratrix, etc. an Appeal has been granted by our Supreme Court of Appeals to a judgment of the Circuit Court of Kanawha County rendered on the 24th day of June, 1986, in that certain action then therein pending in which Iris Martin, Administratrix, etc. was plaintiff, and Charleston Area Medical Center, Inc., et al. were defendants and the same has been docketed in our said Supreme Court of Appeals, we being willing that the error, if any there be, shall be corrected: Now, therefore, we command you that you summon the said Charleston Area Medical Center, Inc., J.

L. Leef, M.D., Associated Radiologists, Inc., Edward G. Lewis, M.D., and Edward G. Lewis, M.D., Inc. to appear before the Justicies of our said Supreme Court of Appeals, at the place provided by law, on the day to be later fixed by the Court, then and there to have a rehearing of the whole matter in said judgment . . . . contained. And have then there this writ.

Witness: GEORGE W. SINGLETON, Clerk of our said Supreme Court of Appeals, this 7th day of March, 1988 and in the 125th year of the State.

/s/Ancil G. Ramey, Clerk.

MEMO - This writ is not to take effect until the petitioner . . . . or some other person shall execute before the Clerk of the Circuit Court of Kanawha

County, bond with good personal security, in the penalty of Fifth Dollars ($50.00) Dollars, conditioned as the law directs.

TESTE: /s/Ancil G. Ramey, Clerk.

(Order Denying Motion to Dismiss Appeal as Being Improvidently Awarded)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 31st day of March, 1988, the following order was made and entered.

Iris Martin, Administratrix of the Estate of Milas Martin, Deceased, Plaintiff Below, Appellant

vs.) No. 18342

Charleston Area Medical Center, Inc., J. L. Leef, M.D., Associated Radiologists, Inc., Edward G. Lewis, M.D., and Edward G. Lewis, M.D., Inc., Defendants Below, Appellees

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 24th day of June, 1986.

On a former day, to-wit, March 25, 1988, came the appellees, J. L. Leef,

M.D., and Associated Radiologists, Inc., by Wood, Grimm & Delp, John F. Wood, Jr., and Dee-Ann Burdette, their attorneys, and presented to the Court their motion with memorandum of law in support thereof to dismiss this appeal as being improvidently awarded for the reasons set forth therein; and, on a later date, to-wit, March 29, 1988, came the appellant, Iris Martin, by Zagula, Hill & Dittmar, and Barry M. Hill, her attorneys, and presented to the Court her memorandum in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion.

A True Copy

Attest: /s/Ancil G. Ramey
Clerk, Supreme Court
of Appeals

(Decision)

NO. 18342

IRIS MARTIN, ADMX.

V.

CHARLESTON AREA MEDICAL CTR., ET AL.

Kanawha County Reversed and remanded

Neely, Justice

Syllabus

In a tort action arising from wrongful death for alleged medical malpractice this Court will set aside a jury verdict and award a new trial on all issues where: (1) the jury verdict is clearly inadequate when the evidence on damages is viewed most strongly in favor of defendant; (2) liability is contested and there is evidence to sustain a jury verdict in favor of either plaintiff or

defendant; and (3) the jury award, while inadequate, is not so nominal under the evidence as to permit the court to infer that it was a defendant's verdict perversely expressed.

Neely, Justice:

In January, 1981 Milas Martin was a regularly employed, black factory worker at the South Charleston Volkswagen plant. He was married to his second wife and had a son and two daughters by that union, plus a daughter by a first marriage. Mr. Martin died as the result of a diagnostic procedure at the Charleston Area Medical Center (C.A.M.C.). The only issue in this case is whether the jury's verdict of $250,000 for wrongful death in this medical malpractice case is inadequate under the standards of Freshwater v. Booth, 160 W.Va. 156, 233 S.E.2d 312

(1977). We find that it is and reverse the judgment of the circuit court.

Milas Martin visited the office of defendant Edward G. Lewis, M.D., a general practitioner, with classic symptoms of diabetes mellitus. When he visited Dr. Lewis, Mr. Martin brought a statement from his employer showing that elevated blood pressure readings had been taken several months earlier. Mr. Lewis sent Mr. Martin to the Charleston Area Medical Center for various tests, one of which was an intravenous pyelogram (known as an IVP). An IVP is a diagnostic x-ray series that requires the injection of a contrast medium, often referred to as dye, for enhancement of the x-rays. In Mr. Martin's case, the purpose of the IVP was to determine whether there was a renal problem causing or contributing to

Mr. Martin's high blood pressure.

Mr. Martin was taken to the radiology department of C.A.M.C. where the IVP was performed under the direction of defendant J. L. Leef, M.D., a radiologist. At the time the IVP was performed, Mr. Martin's hospital chart showed that his primary health problem was uncontrolled diabetes and that no treatment for diabetes had been undertaken. Soon after the dye injection, Mr. Martin had an acute anaphylactoid reaction to the dye. Dr. Leef attended Mr. Martin during the reaction and was soon joined by C.A.M.C.'s emergency team, headed by defendant Dr. Duane Kuhlenschmidt, a resident physician employed by C.A.M.C. Mr. Martin died on the x-ray table from the reaction to the dye injection.

Suit was brought against the doctors involved in the case and the Charleston Area Medical Center on a number of theories, the most prominent of which was lack of informed consent. The uncontradicted evidence demonstrated that Dr. Leef did not inform Mr. Martin that there was some likelihood of a fatal reaction to an IVP. The experts disagreed, however, about the exact extent of the risk. As an alternative theory, plaintiff maintained that because of the high degree of risk from the IVP procedure to a person in Mr. Martin's profile, Dr. Lewis should not have ordered the test, and Dr. Leef should not have performed it. Furthermore, even if after careful deliberation the test had been deemed essential, both Dr. Lewis and Dr. Leef should have delayed performing

the test at least until Mr. Martin's diabetes was brought under control. Finally, plaintiff maintained that Dr. Leef and Dr. Kuhlenschmidt were negligent in their resuscitation efforts.

Expert testimony was presented at trial to support all of these theories of negligence and the defendants presented expert testimony in their defense. The most important aspect of the defendants' case, however, was substantial evidence of contributory negligence on Mr. Martin's part. In this regard, the defendant proved that Mr. Martin did not give Dr. Leef's radiology technician an accurate personal health history. It is the defendants' contention that if Mr. Martin had given an accurate health history, the IVP would definitely not have been performed.

Mr. Martin was evaluated in 1973 at the Veterans Administration Hospital in Huntington and diagnosed as having angina pectoris. In November, 1976, Mr. Martin was diagnosed as having asthma and bronchitis. Mr. Martin had been treated for chest pains and hypertension, and on 29 August 1978, he had a reaction to the high blood pressure medicine he was taking. Furthermore, on 12 September 1978, Mr. Martin had an allergic reaction to a tetanus booster. All of this information, defendants maintain, would have caused them to avoid an IVP.

The plaintiff presented evidence that Mr. Martin was a regularly employed worker at an hourly wage of $11.20 in 1980. By the time of trial, wages had risen to $13.00 per hour in Mr. Martin's job description. There was evidence that

Mr. Martin's historical, average work year was 2400 hours, a figure that included roughly five hours of overtime per week. The plaintiffs presented the expert testimony of John Burke, Ph.D., whose opinion it was that the present value of past and future economic loss to the Martin family, after reducing the gross amount by 35 percent for Mr. Martin's personal consumption, was at the time of trial: (1)$768,000 if Mr. Martin worked to age 59; and, (2) $865,000 if Mr. Martin worked to age 65. Dr. Burke concluded that the plaintiff's economic loss was somewhere between those two figures.

The defendants did not produce their own expert on economic loss, but they did produce testimony from a pathologist who performed an autopsy on Mr. Martin

tending to prove that Mr. Martin would not have lived a normal span of years. The pathologist stated that the autopsy revealed severe narrowing of two of the four coronary arteries and he opined:

> "Personally speaking, this man would have been a candidate for sudden unexpected death at any point in time."

However, the pathologist conceded that persons with severe coronary artery narrowing can live full, vigorous lives.

Special interrogatories were given to the jury, which found in favor of the plaintiff, but assessed 40 percent contributory negligence against the plaintiff's decedent. The jury found Dr. Leef 15 percent negligent, Dr. Lewis 30 percent negligent, and Dr. Kuhlenschmidt 15 percent negligent. As indicated above, they then assessed all damages at

$250,000. It was left, then, to the court to reduce this gross award by 40 percent for Mr. Martin's share of the negligence.

We believe that had the jury's verdict for $250,000 been for economic loss alone, it would not have been contrary to the weight of the evidence. However, when we take into consideration that the plaintiff, in her representative capacity, was also suing for non-economic loss, specifically for loss of a father and loss of a husband, we find that the verdict is inadequate.

The leading case in this jurisdiction on inadequate jury verdicts is Freshwater v. Booth, supra, where we discussed four profiles of inadequate jury verdicts. We believe that this case is a "Type 2" case under the Freshwater

typology. In Freshwater, we explained a "Type 2" case as follows:

> The second type of case is one where liability is strongly contested and the award of damages is clearly inadequate if liability were proven. ... In this situation an appellate court cannot infer from the jury verdict alone whether the jury were confused about the proper measure of damages or whether they were confused about the proper rules for determining liability, or both. These cases represent an extreme example of the compromise verdict which in its less oppressive form has historically been rejected in theory by all appellate courts, yet accepted in practice by almost every bar and bench.
>
> Appellate courts are not so naive as to believe that juries can operate like law professors and segregate the circumstances of liability and the degree of moral fault which those circumstances imply from the proper measure of damages for the victims. [footnote omitted] A jury award for pain and suffering is an inherently subjective undertaking, and the degree of moral fault which a jury imputes to the tortfeasor

> is almost inevitably reflected in the liberality or parsimony of the pain and suffering award. Nevertheless, subjective though pain and suffering awards may be, the jury must give some reasonable compensation for pain and suffering to victims when such pain and suffering have been demonstrated, and an award which is so unreasonable that its adequacy cannot be debated by fair-minded men must be set aside. Where, however, liability is contested and an appellate court is unable to infer whether upon a new trial a jury would find in favor of the defendant or in favor of the plaintiff an appellate court must remand the case for a trial on all issues.

160 W.Va. at 160-62.

In the case before us the defendants could have prevailed entirely on their contributory negligence theory; however, the defendants were unable to adduce any evidence to a reasonable degree of medical certainty proving the exact dimensions of Mr. Martin's lowered life

expectancy. The defendants did demonstrate that Dr. Burke's calculation of economic loss did not take into account: (1) days lost because of strikes; (2) sick days; (3) loss of overtime; (4) plant closings; and (5) unemployment associated with cyclical downturns in the economy.

The defendants maintain that the plaintiff did not prove greater damages, and we are not unmindful of the general rules that "[t]he testimony of expert witnesses is not exclusive, and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weight the testimony of all the witnesses, experts and otherwise; and the same rule applies as to the weight and credibility of such testimony." [Citations omitted]

Webb v. Chesapeake & O. RY. Co., 105 W.Va. 555, 144 S.E. 100, at 103, cert. denied, 278 U.S. 646 (1928).

Indeed, we reaffirm the propositions that the jury has the right to weigh the testimony of all witnesses, experts and otherwise, Middle-West Concrete Forming and Equipment Co. v. General Insurance Co. of America, 165 W.Va. 280, 267 S.E.2d 742 at 747 (1980), and that the jury is to give only as much weight and credit to expert testimony as the jury deems it entitled to when viewed in connection with all the circumstances. Ward v. Brown, 53 W.Va. 227, 44 S.E. 488 (1903). Certainly, "[a] jury is not bound to accept as conclusive the testimony even of an unimpeached witness." Chesapeake & O. Ry. Co. v. Barger, 112 Va. 688, 72 S.E. 693 at 695 (1911).

Nonetheless the property rule in cases of this type is articulated in the syllabus of Freshwater v. Booth, supra, where we said:

> "In a tort action for property damage and personal injuries this Court will set aside the jury verdict and award a new trial on all issues where: (1) the jury verdict is clearly inadequate when the evidence on damages is viewed most strongly in favor of defendant; (2) liability is contested and there is evidence to sustain a jury verdict in favor of either plaintiff or defendant; and (3) the jury award, while inadequate, is not so nominal under the evidence as to permit the court to infer that it was a defendant's verdict perversely expressed."

Indeed, this case is perhaps the mirror image of Roberts v. Stevens Clinic Hosp., Inc., ___ W.Va. ___, 345 S.E.2d 791 (1986) where we entered a $7,000,000 remittitur in a medical malpractice wrongful death case. Originally a

McDowell County jury had awarded $10,000,000 for the death of a minor child, but we held:

> The sky is not the limit with regard to jury awards, and at some point premium payers--who are somewhat like taxpayers--must be protected from paying excessive premiums.

345 S.E.2d at 804. If, indeed, we must determine the upper limits to jury awards, as we did in Stevens Clinic, notwithstanding that such a determination is highly subjective, it is then also appropriate that we vouchsafe a fair floor to such awards. In Stevens Clinic we also pointed out:

> Obviously, if the measure of damages were the value of a human life then, arguably, no jury verdict could be excessive. The death of a family member, particularly a child, involves inconsolable grief for which no amount of money can compensate.

Id. at 800. Certainly the same applies to the loss of a husband and father.

In the case before us our decision is informed to some extent by the fact that the plaintiff is a black woman suing for the death of a black husband and father on behalf of herself and four black children. In cases of this type involving white plaintiffs, when plaintiffs prevail at all, the awards (as, for example, in Stevens Clinic) are substantially higher. A case study of jury verdicts rendered in Cook County, Illinois from 1959-1979, reveals that black plaintiffs received substantially less than white plaintiffs for the same injury when adjusted for the differences in claimed economic losses. Chin & Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials

(1985, Rand Institute for Civil Justice). "On average, black plaintiffs received only three-fourths as much compensation as whites who had the same injury, lost income, and type of legal claim." Id. at 38. In addition, white plaintiffs were six percent more successful on the issue of liability than black plaintiffs similarly situated. Id. at 37. In short, it is well documented that some jury awards are affected by the race of the plaintiff.[1] Although we are not sure that the plaintiff will prevail at all on

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[1]A parallel problem in the context of criminal cases is sufficiently serious that the U.S. Supreme Court in Batson v. Kentucky, 476 U.S. 79 (1986), significantly lowered the evidentiary burden facing a criminal defendant who claims racially motivated use of peremptory jury challenges by the prosecution. See also State v. Marrs, ___ W.Va. ___, ___ S.E.2d ___ (No. 18423 decided _____ March 1989).

retrial, we believe that if she is entitled to anything at all, she is entitled to more than $250,000 reduced by forty percent for her decedent's contributory negligence.

Accordingly, for the reasons set forth above, the judgment of the Circuit Court of Kanawha County is reversed and the case is remanded for a new trial on all issues.

Reversed and remanded.

Justice Workman, deeming herself disqualified, did not participate in the consideration or decision of this case.

(Order Denying Rehearing)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of July, 1989, the following order was made and entered:

Iris Martin, Administratrix
of the Estate of Milas
Martin, Deceased, Plaintiff
Below, Appellant

vs.) No. 18342

Charleston Area Medical
Center, Inc., J. L. Leef,
M.D., Associated Radiologists,
Inc., Edward G. Lewis, M.D.,
and Edward G. Lewis, M.D., Inc.,
Defendants Below, Appellees

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of the opinion to, and doth hereby deny the prayer of the petitioner

and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/Ancil G. Ramey
Clerk, Supreme Court
of Appeals

CONSTITUTION OF THE UNITED STATES:

AMENDMENT XIV

Section 1.

[Citizenship Rights Not
to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WEST VIRGINIA STATUTES:

WEST VIRGINIA CODE

§58-5-4. Time for appeal or writ of error; notice of intent to file petition in criminal cases to be filed with clerk stating grounds.

No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented: Provided, that the judge of the circuit court may, prior to the expiration of such period of eight months, by order entered of record extend and reextend such period for such additional period or periods, not to exceed a total extension of four months, as in his opinion may be

necessary for preparation of the transcript, if the request for such transcript was made by the party seeking such judicial review within sixty days of the entry of such judgment, decree or order. Such judge may also extend and reextend such period for such additional period or periods of time not to exceed a total extension of four months, upon petition made prior to the expiration of the initial eight month period for good cause shown and if the request for such transcript was made by the party seeking such judicial review within sixty days of the entry of such judgment, decree or order.

In criminal cases no petition for appeal or writ of error shall be presented until a notice of intent to file such petition shall have been filed

with the clerk of the court in which the judgment or order was entered within sixty days after such judgment or order was entered. The notice shall fairly state the grounds for the petition without restricting the right to assign additional grounds in the petition. (Code 1849, c. 182, § 3; Code 1860, c. 182, § 3; Code 1868, c, 135, § 2; 1872-3; c. 17, § 3; 1877, c. 44, § 3; 1882, c. 157, § 3; 1899, c. 14, § 3; 1909, c. 39, § 3; 1921, c. 57, § 3; Code 1923, c. 135, § 3; 1965, c. 9; 1973, c. 8.)

§58-5-16. Time for presenting record and giving bond.

No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is

delivered to the clerk of the appellate court, eight months (or the extended period or periods, if any, allowed by order pursuant to section four [§ 58-5-4] of this article) shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months or the extended period or periods, if any, as the case may be, have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect. (Code 1849, c. 182, § 17; Code 1860, c. 182, § 26; 1872-3, c. 17, § 17; Code 1882, c.

157 § 17; 1901, c. 78, § 17; 1909, c. 39, § 17; 1921, c. 57, § 17; Code 1923, c. 135, § 17; 1973, c. 8.)

RULE 3. Petition for Appeal.

(a) Time for Petition. No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than eight months before such petition is presented, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of eight months, extend and re-extend such period, not to exceed a total extension of four months, if a request for the transcript was made by the party seeking an appeal or supersedeas within sixty day of the entry of such judgment, decree or order. In appeals from administrative agencies, the

petition for appeal shall be filed within the applicable time provided by statute.

Rule 4A. Presentation of Petition Without Transcript of Testimony.

(a) Purpose. In order to provide n [sic] inexpensive and expeditious method of appeal, a petitioner may file his petition without the transcript of testimony taken in the lower court.

(b) Filing with Circuit Court. Eight copies of the petition shall be filed in the office of the clerk of the circuit where the judgment or order being appealed was entered within sixty days from the date of entry of the judgment or order. Two additional copies of the petition shall be served upon each party to the action being appealed, as provided in Rule 15, and such parties shall have thirty days to file a reply petition with

the clerk of the circuit court. The respondent shall not be entitled to an oral argument under Rule 5.

(c) Record on Petition. The petitioner shall designate by itemization to the clerk of the circuit court so much of the pleadings, orders and exhibits in the case as will enable the Supreme Court to decide the matters arising in the petition. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises. The petition shall include a certificate by the petitioner's attorney that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability. The use of the abbreviated procedure, set forth in this Rule 4A,

places the highest possible fiduciary duty upon a lawyer with regard to the court and intentional misrepresentation of any sort is grounds for disciplinary action.

(d) Transmission to the Supreme Court. The circuit clerk shall retain in his office one copy of the petition. He shall, at the end of thirty days from the date the petition was filed under paragraph (b), supra, or after respondent has filed a reply petition, whichever occurs first, transmit by certified mail to the Clerk of the Supreme Court seven copies of the petition. The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify

copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(e) Bond for Costs. Before such petition and record are transmitted to the Supreme Court, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record. The clerk shall endorse on the petition that such deposit has been made or such bond filed.